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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MELVIN SMITH,

Defendant and Appellant.

B210551

(Los Angeles County
Super. Ct. No. BA333243)

APPEAL from a judgment of the Superior Court of Los Angeles County. Carol H. Rehm, Jr., Judge. Affirmed.

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Theresa A. Patterson and Robert David Breton, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Melvin Smith (defendant) of selling cocaine base, a controlled substance. (Health & Saf. Code, § 11352, subd. (a).) After waiving his right to a jury trial on his priors, defendant admitted that he had suffered a prior conviction for selling narcotics (Health & Saf. Code, § 11370.2, subd. (a)) and a prior conviction under the Three Strikes law for assault with a deadly weapon (Pen. Code, §§ 667, subds. (b)-(i) & 1170.12, subds. (a)-(d)),¹ and had served six prior prison terms (§ 667.5, subd. (b)). The trial court sentenced defendant to state prison for a term of nine years calculated as follows: the low term of three years for the underlying offense, doubled to six years for the prior strike conviction, with an additional three years for the prior narcotics conviction. The trial court dismissed the six prior prison term enhancements pursuant to section 1385.

Defendant filed two *Pitchess*² motions before the start of trial. On appeal, defendant contends the trial court abused its discretion by: (1) denying the first *Pitchess* motion without conducting an in camera review of the requested materials; and (2) granting the second *Pitchess* motion but restricting the scope of discoverable materials to complaints regarding false police reports. Defendant also requests that we independently review the transcript of the in camera review that resulted from the second *Pitchess* motion to determine whether it was properly conducted. Finding no error with the trial court's rulings or its in camera review, we affirm the judgment against defendant.

BACKGROUND

1. Facts

On December 5, 2007, at approximately 4:15 p.m., Los Angeles Police Department (LAPD) Officer Julius Resnick (Resnick) was sitting in the backseat of an unmarked police surveillance vehicle in an area of Skid Row known for the open use and sale of rock cocaine and heroin. His partner, Officer Brown (Brown), was in the driver's

¹ All further statutory references are to the Penal Code unless otherwise specified.

² *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535 (*Pitchess*).

seat.³ Using 10 by 40 image-stabilizing binoculars and from a distance of 25 to 30 feet, Resnick saw a juvenile (L.T.) approach defendant, who was sitting on the sidewalk on top of a milk crate. As L.T. approached defendant, defendant raised his left hand, which was open and contained a “stack” of cash. L.T. took the cash and entered a nearby building. Resnick observed another juvenile (A.N.) nearby who was looking up and down the street where defendant was sitting.

Approximately 10 seconds after L.T. entered the building he came out and walked toward defendant. At the same time, defendant opened his right palm and faced it upward. L.T. walked by defendant, dropped several “off-white” rocks into defendant’s open palm, and continued walking. Almost immediately, several individuals approached defendant and began handing him money. Resnick saw defendant taking the money and giving the individuals the off-white rocks in return. The last person to approach defendant was Lee Wilson (Wilson). Resnick saw defendant drop an off-white rock into Wilson’s left hand after receiving some money from Wilson. Resnick radioed several officers who were part of the operation and waiting nearby, and directed them to arrest defendant, Wilson, L.T., and A.N.

Officer Burt Feldtz (Feldtz) testified that he and Officer Reyes (Reyes) arrested defendant, who had \$69 in his left hand and carried a glass pipe in his left pants pocket.⁴ Officer John Armando (Armando) testified that he and his partner, Officer Zeismer (Zeismer), arrested Wilson. As they approached him, Wilson dropped an off-white rock that he was carrying to the ground. The officers retrieved the rock, which was later

³ While our normal practice is to refer to each officer by his or her first and last name in the first instance, we are unable to do so in this case with some of the officers whose first names are not apparent in the record.

⁴ Resnick, who had eight years of experience on the LAPD drug enforcement detail, testified that the glass pipe found in defendant’s pocket was the type of pipe used to smoke rock cocaine.

identified as rock cocaine. Officer Jorge Mejia and his partner arrested L.T. and A.N., both of whom had money in their pockets.

Resnick prepared a report detailing defendant's arrest approximately one hour after the arrest occurred. In total, 13 officers were involved in the operation.

2. *Pitchess* Proceedings

Defendant made two *Pitchess* motions. In the first motion, filed in February 2008, defendant sought broad discovery of the personnel records of Resnick, Feldtz, Reyes, Armando, and Zeismer.⁵ In support of the motion, defense counsel filed a declaration in

⁵ The materials sought by defendant included, but were not limited to, the following: “1. Disciplinary Actions or Investigations: The name, address, telephone number, and statements [citation] of all persons who were listed or interviewed as potential witnesses to any misconduct by the named peace officer(s), which led to disciplinary action or investigation in any form [citation], whether or not discipline was imposed [citation]. . . . [¶] . . . [¶] 2. Complainants: The name, address, telephone number, and any other contact information of all persons who filed a complaint or accused any above named officer of misconduct causing an investigation to be generated. This request is to include any and all complainants whether they are civilians, officers, or employees. [¶] 3. Witnesses: The name, address, telephone number, and any other contact information of any and all persons who were interviewed as potential witnesses to any complaints, accusations of misconduct, or any relevant internal investigation, including but not limited to, paragraphs 1 and 2 above. [¶] The requested information shall include all investigations, whether or not the investigation is complete, and shall include not only those identified in the initial complaint, but also all witnesses identified as of the date of the hearing on defendant's motion [citation]. [¶] 4. All records of complainants and investigations of complaints including all statements of complainants or witnesses regarding any relevant acts of misconduct by the officers identified above (Evidence Code, § 1045 (a)). [¶] 5. The dates and locations of all of any relevant misconduct [citation]. [¶] 6. The discipline imposed upon any above named officer as a result of any investigation into any act of misconduct described above. [Citations.] [¶] 7. All statements and evidence obtained as a result of any internal investigation concerning the arrest in *this* case [citation], whether obtained from an officer or other witness. Such statements shall include, but not be limited to, statements contained in any internal affairs reports, use of force reports, law enforcement related injury reports and officer involved shooting reports. [¶] 8. The date of birth of any above named officer [citations]. [¶] 9. A list of all other police departments . . . which have employed any above named officer, along with the dates of such employment and the officer serial number during such employment. [Citations.] [¶] 10. Any other material which is exculpatory or which impeaches the credibility of any above named officer, including

which he first summarized the contents of Resnick's arrest report and then averred: "Defendant denies now and will deny at trial that he engaged in such conduct."

The trial court denied the first *Pitchess* motion without prejudice on the grounds that defendant "[did] not establish a plausible factual foundation for alleged police officer misconduct and [did] not present a specific factual scenario of such misconduct."

In April 2008, defendant made a second *Pitchess* motion seeking discovery of largely the same materials that he sought in the first *Pitchess* motion, but this time only as to Resnick and his partner, Brown. In support of the motion, defense counsel averred that defendant "did not receive a hand full of cocaine in the base form (rocks)[,] . . . was not a participant to any drug activities which may or may not have been conducted by [L.T.] and [A.N.]" and "did not supply, sell, or furnish drugs to Defendant Wilson as described by Officers Resnick and Brown in their police report." At the hearing on the *Pitchess* motion, defense counsel represented to the trial court that defendant was at the location where the arrests occurred because defendant was "homeless" and "that is just what homeless people do, hang out and . . . stand[] there." Defense counsel also clarified that his theory of police misconduct was that the officers were simply lying about what occurred.

Based on defense counsel's representation that defendant was in the area because he was a homeless person, the trial court found that defendant had established good cause to review the personnel records of Resnick "in the area of false police reports." The trial court denied the *Pitchess* motion altogether as to Brown because defendant had made no allegation of misconduct against him.⁶ The trial court transferred the matter to another department for an in camera review of Resnick's personnel file. The *Pitchess* court found relevant materials pertaining to false police reports and ordered them disclosed to the defense.

material which reflects acts of misconduct which occurred more than five years prior to the date of the alleged offense in this case." (Fns. omitted.)

⁶ Brown did not testify at trial.

In July 2008, defense counsel filed a supplementary *Pitchess* motion seeking discovery of disciplinary records in Resnick’s personnel file that related to a complaint filed against Resnick by Leslie Mosley (Mosely).⁷ According to the defense, the records were necessary because the previous *Pitchess* discovery was inadequate. The prosecution indicated at the hearing that it had Mosley’s witness statement and that it would turn over the statement to the defense. The trial court denied the supplemental *Pitchess* motion on the grounds that defendant had failed to show a manifest necessity for Resnick’s disciplinary records. The trial court stated that if the defense found the statement by Mosley insufficient, it could return and file another *Pitchess* motion.

Subsequently, the trial court held an Evidence Code section 402 hearing and ruled that if Mosley testified at trial, the prosecution could impeach his credibility with three of his numerous convictions for crimes of moral turpitude. Defendant elected not to call Mosley to testify at trial.

DISCUSSION

I. Defendant’s Contentions

Defendant contends the trial court abused its discretion by: (1) denying the first *Pitchess* motion without an in camera review as to Feldtz (who arrested defendant) and Armando (who arrested Wilson); (2) limiting discovery in the second *Pitchess* motion to materials relating to false police reports in Resnick’s personnel file, and not as to records of discipline imposed and *Brady*⁸ material. Defendant also requests that we review the

⁷ In support of the motion, an investigator from the Los Angeles County Alternate Public Defendant’s office, Guadalupe Luna, averred the following in a declaration: (1) she was asked to interview Mosley along with seven officer witnesses as a result of the *Pitchess* discovery; (2) she located Mosley in county jail and Mosley stated to her that “he did not remember all of the details of the incident of misconduct that he witnessed . . . and would not discuss the matter any further”; (3) she sent the officers letters asking for interviews and indicating that if they did not call her back, she would assume that they were declining an interview; and (4) the officers did not call her back.

⁸ *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

sealed transcript of the in camera review that resulted from the granting of the second *Pitchess* motion to determine if the *Pitchess* court properly conducted the review.

II. Relevant Authority

In *Pitchess*, the California Supreme Court held that a criminal defendant is entitled to discover an officer's personnel records if the information contained in them is relevant to his ability to defend against the charges filed by the prosecution. (*Pitchess, supra*, 11 Cal.3d at p. 535.) To obtain disclosure of police personnel records, a defendant must submit affidavits establishing "good cause." (Evid. Code, § 1043, subd. (b)(3); *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019 (*Warrick*).) Good cause exists when the defendant demonstrates (1) materiality of the requested material to the subject matter of the pending action, and (2) a reasonable belief the agency has the type of information sought. (Evid. Code, § 1043, subd. (b)(3); *Warrick, supra*, at pp. 1016, 1019.)

To show that the requested information is material, a defendant is required to "establish not only a logical link between the defense proposed and the pending charge, but also to articulate how the discovery being sought would support such a defense or how it would impeach the officer's version of events." (*Warrick, supra*, 35 Cal.4th at p. 1021.) A showing of materiality requires the defendant to set forth a "specific factual scenario" of officer misconduct applicable to his or her case that establishes "a plausible factual foundation" and articulates a valid theory of admissibility for the information sought. (*Id.* at pp. 1019, 1025.) A "plausible scenario of officer misconduct is one that might or could have occurred." (*Id.* at p. 1026.) Mere relevance to credibility, however, is insufficient to warrant disclosure, without a showing of good cause. (See *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1023-1024 (*CHP*).) To permit discovery of any generally relevant matter in a peace officer's personnel file would effectively destroy the protection provided to those files by Evidence Code sections 1043 through 1045. (*CHP, supra*, at pp. 1023-1024.)

We review a trial court's ruling on a *Pitchess* motion for abuse of discretion. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1220-1221.) That discretion is broad. (*People v. Samayoa* (1997) 15 Cal.4th 795, 827.)

III. Motion Properly Denied as to Feldtz and Armando

The trial court did not abuse its discretion by denying defendant's first *Pitchess* motion as to Feldtz and Armando. Although demonstrating good cause is subject to a relatively low threshold (*Warrick, supra*, 35 Cal.4th at p. 1019), defendant's motion did not meet this requirement.

People v. Thompson (2006) 141 Cal.App.4th 1312 (*Thompson*) is instructive. In that case, the defendant was arrested after he sold cocaine to an undercover police officer. Uniformed officers who were not part of the undercover operation searched the defendant and found two \$5 bills, which were later identified as the bills the undercover officer gave to the defendant for the cocaine. (*Id.* at p. 1315.) Attached to defendant's *Pitchess* motion was a declaration from defense counsel in which counsel averred that defendant did not sell drugs to the undercover officer and was not carrying two \$5 bills when he was arrested. (*Thompson*, at p. 1317.) The declaration accused the officers of fabricating the events altogether to avoid liability for their own behavior. (*Ibid.*)

The Court of Appeal affirmed the trial court's denial of the defendant's *Pitchess* motion without an in camera review, because the defendant "[did] not present a factual account of the scope of the alleged police misconduct, and [did] not explain his own actions in a manner that adequately support[ed] his defense." (*Thompson, supra*, 141 Cal.App.4th at p. 1317.) Specifically, the court pointed out that defendant "[did] not state a nonculpable explanation for his presence in an area where drugs were being sold, sufficiently present a factual basis for being singled out by the police, or assert any 'mishandling of the situation' prior to his detention and arrest." (*Ibid.*) The "declaration simply denied the elements of the offense charged," which was insufficient to meet the standard for an in camera review. (*Ibid.*) The *Thompson* court pointed out that even though *Warrick* defined "plausible" as what might or could have occurred, it did not deprive trial courts of the ability "to apply common sense in determining what is plausible, and to make determinations based on a reasonable and realistic assessment of the facts and allegations." (*Thompson, supra*, at pp. 1318-1319.)

Like the declaration in *Thompson*, the declaration in support of defendant's first *Pitchess* motion utterly failed to present a factual account of the scope of the alleged police misconduct and explain defendant's own actions in a manner that adequately supported his defense that Resnick and the other officers fabricated the contents of the arrest report. Defendant did not explain why he was in the area where the arrests occurred in the first place. Nor did he explain why he was carrying a glass pipe used for smoking cocaine. Finally, the declaration fails to explain the scope of the alleged police misconduct insofar as it provides no clue as to how or whether Feldtz or Armando were involved in a conspiracy with Resnick to fabricate the contents of the police report.

For those reasons, we conclude the trial court did not abuse its discretion by denying defendant's *Pitchess* motion without first conducting an in camera review.

IV. Motion Properly Granted as to Resnick

We first consider the trial court's ruling denying discovery of disciplinary records contained in Resnick's personnel file.

Defendant correctly points out that an investigating body's ruling on a complaint of police misconduct and the nature of any discipline imposed is subject to discovery. (*City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 55; Evid. Code, § 1045, subd. (a).) Such "sensitive information," however, "will be disclosed only upon a showing of manifest necessity." (*County of Los Angeles v. Superior Court* (1993) 18 Cal.App.4th 588, 600.) Here, defendant's entire defense was that Resnick never saw him receive or sell rock cocaine, and that the officer had filed a false police report. The *Pitchess* court had already granted defendant access to discovery related to the filing of false police reports, and the prosecution turned over Mosley's statements containing his charges against Resnick. The trial court could reasonably conclude that any additional information regarding the nature or type of discipline imposed on Resnick would add little to what defendant already had as it pertained to the issue of whether Resnick filed a false police report which was the crux of defendant's defense. Thus, it was not an abuse of discretion for the trial court to conclude that defendant failed to demonstrate the manifest necessity of disclosing such information.

We turn next to discovery of *Brady* material. “In *Brady*, the high court announced a rule, founded on the due process guarantee of the federal Constitution, that requires the prosecution to disclose evidence that is favorable and ‘material’ to the defense.” (*City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 7.) A defendant, however, cannot ““require the trial court to search through the [officer’s] file without first establishing a basis for his claim that it contains *material* evidence’ [citation], that is, evidence that could determine the trial’s outcome, thus satisfying the materiality standard of *Brady, supra*, 373 U.S. 83.” (*Brandon*, at p. 15.) Here, the evidence that could have determined the trial’s outcome would have been evidence that Resnick had filed false reports in the past. Such evidence would have impeached the officer’s credibility and bolstered defendant’s theory that the officer fabricated his observations. The trial court ordered an in camera review of Resnick’s file for precisely this information. Thus, the trial court committed no error.

V. Hearing Properly Conducted

When requested to do so by an appellant, an appellate court can and should independently review the transcript of the trial court’s in camera *Pitchess* hearing to determine whether the trial court disclosed all relevant complaints. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229.)

We have reviewed the record of the *Pitchess* motion in this case and find it adequate to permit meaningful appellate review. There is a full transcript of the in camera hearing, including a description of the documents provided by the custodian of records. We have independently reviewed that transcript and see no error in the *Pitchess* court’s rulings concerning disclosure.

DISPOSITION

The judgment is affirmed.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST